Supreme Court, U.S.
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No. 87-1859

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

AIR TRANSPORT ASSOCIATION OF AMERICA,
DELTA AIR LINES, INC.,
PAN AMERICAN WORLD AIRWAYS, INC.,
UNITED AIRLINES, INC., AMERICAN AIRLINES, INC.,
NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC.,
AIR CANADA, USAIR, INC. AND EASTERN AIRLINES, INC.,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA; and
VICTOR CALVO, PRISCILLA C. GREW,
RONALD VIAL, LEONARD M. GRIMES, JR.
and WILLIAM T. BAGLEY, the members of
and constituting said Public Utilities Commission,
Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GILMORE F. DIEKMANN, JR.*
ELLIOT L. BIEN
BRONSON, BRONSON & MCKINNON
555 California Street, Suite 3400
San Francisco, California 94104
Telephone: (415) 986-4200
Attorneys for Petitioners
Air Transport Association
of America, et al.

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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Petitioners Air Transport Association of America, et al., submit this reply brief, in accordance with Supreme Court Rule 22.5, to respond to the arguments first raised in the opposition brief filed by respondents The Public Utilities Commission of the State of California ("CPUC") and its Commissioners.

I

INTRODUCTION

Because respondents simply restate the rulings of the Ninth Circuit on the points raised by the petition, and apparently have no answer to petitioner's arguments concerning the constitutional and statutory questions raised by the Ninth Circuit's rulings, petitioners are not presented with any arguments on the "questions presented" requiring a response. Respondents do raise, however, a spurious "res judicata" argument which petitioners will address below.

II

PETITIONERS INITIATED A TIMELY ATTACK ON THE ORDER AT ISSUE

Respondents suggest that, because petitioners did not file a petition for certiorari in the California Supreme Court within thirty days of the CPUC's adoption of General Order 107-B, petitioners somehow are barred by the doctrine of "res judicata" from filing a petition in this Court. This curious agrument, never made before in the five-year history of this litigation, is nonsensical legally[1] and is based on a half-truth.

Although it is true that petitioners did not file a petition for a writ of certiorari in the California Supreme Court attacking the CPUC's adoption of G.O. 107-B, petitioners *did* attack G.O. 107-B, on both state and federal grounds, by filing this action in the United States District Court on November 18, 1983. Because the CPUC's final order adopting G.O. 107-B was entered on October 19, 1983 (App. G), all of petitioners claims—their state law claims as well as their federal law claims—were initiated within thirty days. Consequently, they were timely under all arguable

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[1] How a failure to file a claim within a period allowed by a statute of limitations could constitute a "judgment" entitled to res judicata effect or "full faith and credit" is nowhere explained and makes no legal sense. G.O. 107-B itself is not an adjudication of a claim; it is the action of the CPUC that violates petitioners' federal and state law rights.

limitations periods. Respondents' failure ever to argue in either the district court or the Court of Appeals that any of petitioners' claims were not presented in a timely manner demonstrates even further the spurious nature of their argument.

Furthermore, because petitioners chose to attack the CPUC's order on both federal and state grounds in federal court, and therefore did not initiate parallel proceedings in the California Supreme Court, the California Supreme Court never considered and never denied a petition for certiorari in this matter. Consequently, there is no state court judgment upon which a res judicata finding could be premised, and all of the authorities cited in the CPUC's brief are inapposite.[2]

In sum, the CPUC's "res judicata" argument has no basis in law or fact and does not establish a reason for denying certiorari on the issues presented in the petition. It simply constitutes another in an unbroken series of efforts by respondents to avoid a

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[2] At one point in the proceedings before the district court, the court afforded the California Supreme Court an opportunity to assume jurisdiction over the state law claims when it dismissed those claims without prejudice, stayed entry of judgment, and allowed petitioners time to ask the state supreme court to allow the filing of a petition raising the respective issues. The California Supreme Court declined this opportunity to assume jurisdiction over the matter when the CPUC argued, *inter alia*, that the issues already were being litigated in the federal court and that petitioners would "have their day in court" in that forum. Only thereafter did the district court finally decide the issues now before this Court in petitioners' favor. An argument by the CPUC that the state supreme court's failure to assume jurisdiction barred further action in the district court was fully briefed in the district court and unequivocally resolved against the CPUC. (App. C, at C-7). The Ninth Circuit did not even address the question. (App. A, at A-13n.9) Also, no case or other authority cited by respondents indicates that a state court's discretionary refusal to assume jurisdiction over an issue has res judicata effect under any state or federal principle of law. Indeed, even California Supreme Court denials of petitions for certiorari taken from an administrative agency's orders have res judicata effect *only* when they are based on the *merits* of the petition. *Donia v. Alcoholic Bev. Appeals Board*, 167 Cal.App.3d 588, 594, 213 Cal.Rptr. 447 (1985); *People v. Medina*, 6 Cal.3d 481, 491n.6, 99 Cal.Rptr. 630, 492 P.2d 686 (1972).

decision on the merits in every forum that has considered this matter, a tactic that eventually failed in the district court but which succeeded in the Ninth Circuit to an extent that has made the present petition necessary.

III

CONCLUSION

The Ninth Circuit's decision in this case raises substantial constitutional questions and interprets two important federal statutes in a manner that significantly impairs the rights the statutes secure and the federal interests they are intended to promote. The Court of Appeal's rulings certainly will have an impact far beyond their immediate effect on petitioners and this litigation. Consequently, this petition presents important federal questions that deserve this Court's attention.

Dated: June 17, 1988.

Respectively submitted,
GILMORE F. DIEKMANN, JR.*
ELLIOT L. BIEN

By GILMORE F. DIEKMANN, JR.

BRONSON, BRONSON & MCKINNON
555 California Street, Suite 3400
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